Response to Advance Notice of Proposed Rulemaking

Regarding Revisions to 36 C.F.R. 228

83 Fed. Reg. 46451 (September 13, 2018)

Submitted on behalf of

Barrick Gold of North America

October 15, 2018

Introduction

These comments are submitted on behalf of Barrick Gold of North America ("BGNA") and its affiliates (collectively "Barrick") in response to the September 13, 2018 advance notice of proposed rulemaking seeking comments on revisions to update, clarify or enhance the regulations that control surface impacts of mining of locatable minerals on National Forest Lands. 83 Fed. Reg. 46451 (September 13, 2018).

BGNA is a wholly owned subsidiary of Barrick Gold Corporation. BGNA and its affiliate companies own and/or operate gold mines in Nevada and Montana that include unpatented mining claims. Barrick expects and intends to conduct exploration and mining on National Forest Lands. Any such activities will be subject to 36 C.F.R. Part 228. Accordingly, Barrick has a strong interest in any changes to the existing regulations.

Barrick is a member of the National Mining Association and the American Exploration and Mining Association. Barrick endorses the comments of those two organizations and incorporates them by reference into these comments.

1. The Forest Service should proceed immediately with a proposed rule similar to BLM's "notice" rule for exploration with less than five acres of surface disturbance.

Almost twenty years ago, the National Research Council, in its study of hard rock mining on federal lands, recommended "Forest Service regulations should allow exploration disturbing less than 5 acres to be approved or denied expeditiously, similar to notice-level exploration activities on BLM lands." National Research Council ("NRC"), Hard Rock Mining on Federal Lands, 1999, at p. 97. The Forest Service proposed a rule to respond to this recommendation in 2008 that would have created a "bonded notice" but it was not finalized. See 73 Fed. Reg. 15694, 15704 (March 25, 2008).

Because of the importance of this issue to the agency and the exploration community, the Forest Service should prioritize this revision over all other changes to the Part 228 regulations and proceed immediately with a proposed rule to authorize "notice" level exploration. The proposed rule should 1) apply only to exploration activities; 2) apply only where new surface disturbance will be less than five total acres; and 3) require adequate financial assurance for

reclamation. Exploration activities under a "bonded notice" should not be time limited. The 2008 proposal required that the surface disturbance "last no longer than two years." That limitation is unreasonable and renders the provision impractical for exploration in many areas, particularly if the two year limit is interpreted to include reclamation. Reclamation should be required to be conducted as soon as practicable after exploration activities are concluded, but there should be no regulatory time limit on the notice.

In comparison, BLM regulations specify that a notice expires after two years, but allow unlimited extensions of the two-year limit. See 43 C.F.R. §§ 3809.332 and .333. A similar Forest Service rule would be acceptable, but Barrick would prefer a longer period or no time limit on the "bonded notice."

Action on the "bonded notice" regulation deserves immediate attention because it will encourage exploration on Forest Service land (consistent with the authorities cited in the preamble to the ANPR at 83 Fed. Reg. 46452 and 46453) and reduce the workload on local Forest Service employees. BLM's long experience with the process provides the Forest Service with hundreds of examples of notice level exploration being conducted and reclaimed, providing substantial data to support expedited rulemaking, including compliance with the National Environmental Policy Act. Barrick hopes that the Forest Service can finalize such a rule in less than one year.

2. The Forest Service should propose changes to the Part 228 regulations to conform to the NRC recommendations and make them more consistent with BLM's 43 C.F.R. Subpart 3809 regulations.

Barrick agrees with the stated intent of the ANPR: to clarify the regulations, increase consistency with BLM surface management regulations, assist those who conduct operations under the mining laws, and increase nationwide consistency in the application of the Part 228 regulations. 83 Fed. Reg. at 46451. In response to the specific questions raised in the ANPR we offer the following suggestions.

- The proposed regulations should adopt BLM's classifications of casual use, notice level operations and plan of operations.

- For operations that require a plan of operations, the proposed regulations should specify the contents of a typical plan (emphasizing that not all content requirements may apply to all plans) and encourage operators to meet with the Forest Service to discuss plan contents before submitting a plan of operations.

- Barrick agrees with other commenters who have encouraged the Forest Service to adopt practices to streamline NEPA procedures applicable to mining activities on Forest lands, but believe these issues should be addressed more broadly in NEPA processes, practices and rules and not in the text of the 228 regulations.

- The proposed regulations should authorize the Forest Service to require a modification to a plan of operations in circumstances similar to those identified in

BLM's regulations at 43 C.F.R. § 3809.431. Current Forest Service legal authority does not allow the agency to adopt a rule that would require a modification "to reflect advances in predictive capacity, technical capacity and mining technology," 83 Fed. Reg. at 46455. The proposed rule should not include any such provision.

- The proposed regulations should include additional language to authorize use and occupancy of land under the mining laws, but Barrick believes the discussion in the ANPR might be read to unduly limit authorized uses. The Forest Service should adopt or incorporate BLM's use and occupancy rules at 43 C.F.R. Subpart 3715. BLM's regulations have resolved most of the occupancy problems described by the ANPR at 83 Fed. Reg. 46456.[1]

- With regard to the 228 regulations, we support the recommendation of the AEMA that the Forest Service adopt the following definition of mineral activities: "Mineral activities means any activity on National Forest Lands on mining claims with or without a discovery, or off of mining claims, for mineral prospecting, exploration, development, mining, extraction, milling, beneficiation, processing, storage of mined or processed materials or reclamation activities for any locatable mineral and uses reasonably incident thereto, including the construction, use and maintenance of roads, transmission lines, water wells, pipelines, utility corridors, tunnels, shafts, adits and other means of access across or under National Forest lands for ancillary facilities used in conjunction with mineral activities."

- The proposed regulation should include an update and expansion of current regulations regarding financial assurance. The Forest Service should propose and adopt regulations similar to BLM's financial assurance regulations, including a requirement for periodic review of the adequacy of financial assurance and to provide funding mechanisms, such as a long-term trust, to provide financial assurance for post-closure obligations.

Conclusion

Barrick appreciates the opportunity to comment on the advance notice of proposed rulemaking. We look forward to seeing a proposed rule creating the "bonded notice" category of operations on National Forest lands and a broader proposal updating and clarifying the regulations.

[1] The GAO report referenced in the ANPR is almost thirty years old and does not reflect BLM's current experience under the use and occupancy regulations. The Forest Service should not rely on this outdated information for a proposed rule but should consult directly with BLM regarding experience under the current regulations.